Tan Sri Dato' Dr Rozali bin Ismail v Ketua Pengarah/Ketua Hakim Syarie, Jabatan Kehakiman Syariah Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW APPLICATION NO WA-25–248–07 OF 2021
WAN AHMAD FARID J
8 NOVEMBER 2023

Administrative Law — Judicial review — Application for — Syariah Court judge who heard applicant's nusyuz summons was transferred to Attorney General's Chambers — Nusyuz summons heard before another judge — Applicant applied for recusal of new judge because new judge was the same judge in applicant's wife's divorce proceedings — Applicant applied for recall of previous judge — Director General and Chief Judge, Department of Syariah Judiciary Malaysia via a letter rejected applicant's application ('the decision') — Applicant filed judicial review application — Whether impugned letter amenable to judicial review — Whether decision was administrative decision or judicial decision — Whether a fair trial included right to have case heard before same judge from the beginning until the end — Whether nusyuz summons ought to be heard before another judge — Rules of Court 2012 O 53

Islamic Law — Shariah court — Decision — Syariah Court judge who heard applicant's nusyuz summons was transferred to Attorney General's Chambers — Nusyuz summons heard before another judge — Applicant applied for recusal of new judge because new judge was the same judge in applicant's wife's divorce proceedings — Applicant applied for recall of previous judge — Director General and Chief Judge, Department of Syariah Judiciary Malaysia via a letter rejected applicant's application ('the decision') — Applicant filed judicial review application — Whether impugned letter amenable to judicial review — Whether decision was administrative decision or judicial decision — Whether a fair trial included right to have case heard before same judge from the beginning until the end — Whether nusyuz summons ought to be heard before another judge

The applicant had filed a summons for disobedience, known in the Islamic family law as *nusyuz* against his second wife ('Justynn') and the matter was heard before Judge Saifullah bin Hamzah ('Tuan Saifullah') before the latter was transferred to the prosecution's division of the Attorney General's Chambers ('AGC'). Judge Rosdi bin Hanapi ('Tuan Rosdi') then took over the matter but upon discovering that Tuan Rosdi was the judge hearing the divorce proceedings filed by Justynn, the applicant filed an application for the recusal of Tuan Rosdi. Following the recusal application, the applicant applied to the Director General and Chief Judge, Department of Syariah Judiciary Malaysia

('the first respondent') to have Tuan Saifullah resumes hearing and adjudicating the *nusyuz* summons ('the recall application') on the grounds that: (a) the *nusyuz* summons had reached an advanced stage before Tuan Saifullah with the completion of the applicant's case; and (b) Tuan Saifullah had the advantage of seeing and hearing the applicant's witnesses and demeanour of the witnesses, hence, he was better positioned to appreciate the facts before him and to complete hearing of the nusyuz summons. In this regard, the AGC had no objections to releasing Tuan Saifullah for hearing off the *nusyuz* summons subject to the requirement of a valid 'tauliah'. Via a letter dated 14 April 2021 ('the impugned letter'), the first respondent rejected the recall application ('the impugned decision'), hence, the present judicial review application by the applicant. The issue to be determined was whether the impugned letter was amenable to judicial review.

Held, allowing the judicial review application in part with no order as to costs:

(1) The approach to determining the issue was first to identify whether the decision was an administrative one or a judicial one. In the impugned letter, the first respondent conceded that he was exercising his administrative function. Therefore, considering that the decision was made in the administrative capacity, it was amenable to judicial review under O 53 of the Rules of Court 2012 (see paras 38–39 & 41).

(2) The court agreed with the senior federal counsel that a fair trial did not include a right to have the case heard before the same judge from the beginning until the end. To insist on the same trial judge to continue hearing a case at all costs despite it being legally impractical was akin to forum shopping, which the court was not prepared to do. However, considering that Tuan Rosdi was the same trial judge for the divorce proceedings as well as the *nusyuz* proceedings, and the nature of the dispute between these two proceedings which involved Islamic family law, the court was of the view that it would be desirable for the *nusyuz* proceedings to be heard by another judge other than Tuan Rosdi (see paras 45–47).

(3) Based on the above findings, the court made the following orders: (a) the impugned decision was amenable to judicial review to the extent that the direction to retain Tuan Rosdi was tainted with *Wednesbury* unreasonableness; (b) the court was not prepared to issue an order for Tuan Saifullah to continue presiding at the *nusyuz* proceedings considering that the court had no power to direct the Yang di-Pertuan Agong to appoint Tuan Saifullah as a judge of the Syariah Subordinate Court; (c) however, the dictate of a fair trial required the *nusyuz* case to be heard by another judge of competent jurisdiction other than Tuan Rosdi and the court so ordered; and (d) all other relief sought by the applicant were dismissed (see para 48).

[Bahasa Malaysia summary

Pemohon telah memfailkan saman keingkaran, yang dikenali dalam undang-undang keluarga Islam sebagai nusyuz terhadap isteri keduanya ('Justynn') dan perkara tersebut didengar di hadapan Hakim Saifullah bin Hamzah ('Tuan Saifullah') sebelum beliau dipindahkan ke bahagian pendakwaan, Jabatan Peguam Negara ('JPN'). Hakim Rosdi bin Hanapi ('Tuan Rosdi') kemudian mengambil alih perkara tersebut tetapi apabila mendapati Tuan Rosdi adalah hakim yang mendengar prosiding penceraian yang difailkan oleh Justynn, pemohon memfailkan permohonan untuk pengunduran diri Tuan Rosdi. Berikutan permohonan pengunduran diri tersebut, pemohon memohon kepada Ketua Pengarah dan Ketua Hakim, Jabatan Kehakiman Syariah Malaysia ('responden pertama') supaya Tuan Saifullah menyambung semula pendengaran dan penghakiman saman nusyuz tersebut ('permohonan pemanggilan semula') atas alasan-alasan bahawa: (a) saman nusyuz tersebut telah mencapai tahap lanjut di hadapan Tuan Saifullah dengan selesainya kes pemohon; dan (b) Tuan Saifullah mempunyai kelebihan untuk melihat dan mendengar saksi-saksi pemohon dan gelagat saksi-saksi, justeru, beliau lebih berkedudukan untuk menghayati fakta yang ada di hadapannya dan menyempurnakan pendengaran saman nusyuz tersebut. Berhubung dengan ini, JPN tidak ada bantahan untuk melepaskan Tuan Saifullah untuk mendengar saman nusyuz tersebut tertakluk kepada keperluan 'tauliah' yang sah. Melalui surat bertarikh 14 April 2021 ('surat yang disangkal'), responden pertama menolak permohonan pemanggilan semula tersebut ('keputusan yang disangkal'), oleh itu, permohonan semakan kehakiman semasa oleh pemohon. Isu yang perlu ditentukan ialah sama ada surat yang disangkal tersebut boleh disemak secara kehakiman.

Diputuskan, membenarkan sebahagian permohonan semakan kehakiman tanpa perintah berkaitan kos:

(1) Pendekatan untuk menentukan isu tersebut adalah terlebih dahulu untuk mengenal pasti sama ada keputusan tersebut adalah keputusan pentadbiran atau kehakiman. Dalam surat yang disangkal tersebut, responden pertama mengakui bahawa dia menjalankan fungsi pentadbirannya. Oleh itu, memandangkan keputusan tersebut dibuat dalam kapasiti pentadbiran, ia boleh disemak secara kehakiman di bawah A 53 Kaedah-Kaedah Mahkamah 2012 (lihat perenggan 38–39 & 41).

(2) Mahkamah bersetuju dengan peguam kanan persekutuan bahawa perbicaraan yang adil tidak termasuk hak untuk kes dibicarakan di hadapan hakim yang sama dari awal hingga akhir. Untuk mendesak hakim perbicaraan yang sama untuk meneruskan perbicaraan kes dalam apa jua keadaan walaupun ia tidak praktikal dari segi undang-undang adalah serupa dengan 'forum shopping', yang mahkamah tidak bersedia untuk melakukannya. Walau bagaimanapun, memandangkan Tuan

Rosdi adalah hakim perbicaraan yang sama untuk prosiding perceraian tersebut serta prosiding nusyuz, dan sifat pertikaian antara kedua-dua prosiding ini yang melibatkan undang-undang keluarga Islam, mahkamah berpendapat ia adalah wajar untuk prosiding nusyuz tersebut didengar oleh hakim lain selain Tuan Rosdi (lihat perenggan 45–47).

(3) Berdasarkan dapatan-dapatan di atas, mahkamah membuat perintah-perintah berikut: (a) keputusan yang disangkal tersebut boleh disemak secara kehakiman setakat mana arahan untuk mengekalkan Tuan Rosdi dicemari dengan ketidakwajaran *Wednesbury*; (b) mahkamah tidak bersedia mengeluarkan perintah supaya Tuan Saifullah terus mempengerusikan prosiding nusyuz tersebut memandangkan mahkamah tidak mempunyai kuasa untuk mengarahkan Yang di-Pertuan Agong melantik Tuan Saifullah sebagai hakim Mahkamah Rendah Syariah; (c) walau bagaimanapun, keperluan perbicaraan yang adil menghendaki kes nusyuz tersebut dibicarakan oleh hakim lain yang mempunyai bidang kuasa kompeten selain daripada Tuan Rosdi dan oleh itu mahkamah memerintahkan sedemikian; dan (d) semua relif-relif lain yang dipohon oleh pemohon ditolak (lihat perenggan 48).]

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680, CA (refd)

Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor [2021] 2 MLJ 323, FC (refd)

Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)

Lee Kwan Woh v PP [2009] 5 MLJ 301, FC (refd)

Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (refd)

ZI Publications Sdn Bhd & Anor v Jabatan Agama Islam Selangor & Ors [2018] 5 MLJ 814, CA (refd)

Legislation referred to

Administration of Islamic Law (Federal Territories) Act 1993 ss 44, 48, 51(1)
Federal Constitution arts 4(1), 5, 5(1), 8, 8(1), 121(1), (1A)
Islamic Family Law (Federal Territories) Act 1984 s 47
Rules of Court 2012 O 53

Lim Choon Khim (with Fadzilah bt Mohd Pilus, Elyazura bt Md Shaarani @ Md Nawi, Chin Yan Leng, Damien Chan Kay Ding and Ian Hannibal Liang bin Danial Liang) (CK Lim Law Chambers) for the applicant.

Ahmad Hanir bin Hambaly @ Arwi (with Mohammad Sallehuddin bin Md Ali) (Attorney General's Chambers) for the respondent.

Wan Ahmad Farid J:

[1] The applicant's case can be summarised as follows.

[2] The first respondent above named is the Director General and Chief Judge, Department of Syariah Judiciary Malaysia. The second respondent is the Chief Syariah Judge of the Federal Territories.

[3] On 4 May 2017, the applicant took out a summons for disobedience, known in the Islamic family law as *nusyuz* ('the *nusyuz* summons'), against his second wife, Justynn Cassandra bt Mohamad Firdaus ('Justynn') at the Kuala Lumpur Syariah Subordinate Court ('MRS Kuala Lumpur'). The subject matter at the MRS Kuala Lumpur was the alleged incidents of disobedient behaviour by Justynn from 5 March 2014 until 25 April 2017.

[4] Before the final disposal of the *nusyuz* summons, Justynn had filed an application for confirmation of divorce (*pengesahan cerai*) ('confirmation of divorce summons') on 18 May 2017 at the MRS Kuala Lumpur The *nusyuz* summons was assigned to Judge Izzat Syazli bin Murshid ('Tuan Izzat'). It was fixed for the first mention before Tuan Izzat on 25 May 2017.

[5] On 11 September 2017, Tuan Izzat ordered that Justynn's confirmation of divorce summons be disposed of first. The attendant consequence of that direction is that the *nusyuz* summons is stayed.

[6] Aggrieved by the stay order, the applicant filed an application at the Kuala Lumpur Syariah High Court ('MTS Kuala Lumpur') to review the said decision. The review application was allowed by the MTS Kuala Lumpur. Consequently, the *nusyuz* summons was ordered to be heard before another judge at the MRS Kuala Lumpur

[7] The *nusyuz* summons was then assigned to be heard before Judge Saifullah bin Hamzah ('Tuan Saifullah'). After the pleadings and other cause papers, including the bundles of documents, had been exhausted, the nusyuz summons proceeded to trial before Tuan Saifullah. The trial commenced on 18 December 2017 for numerous days intermittently for more than 30 days until 22 October 2019.

[8] In the meantime, Justynn's confirmation of divorce summons was dismissed by MRS Kuala Lumpur on 4 June 2018.

[9] During the trial of the *nusyuz* summons before Tuan Saifullah, the applicant and three other witnesses completed their evidence. Voluminous

documents were produced during the trial. The applicant finally closed his case on 3 October 2019.

[10] On 4 October 2019, Justynn filed her witness statement and bundle of documents.

[11] In the course of the continued trial, Justynn applied for the notes of evidence, which application was disallowed by Tuan Saifullah. On 10 October 2019, Justynn filed an application at the MTS Kuala Lumpur to review Tuan Saifullah's decision to dismiss her application for the notes of evidence ('Justynn's review application').

[12] Unfortunately, Tuan Saifullah was unable to proceed with the continued trial of the *nusyuz* summons after 4 October 2019 as he was transferred to the prosecution division of the Attorney General's Chambers ('AGC'). When Tuan Saifullah's transfer came to the applicant's knowledge, the applicant instructed his Syariah counsel to apply to the AGC to release Tuan Saifullah so that he may continue with the trial and adjudication of the *nusyuz* summons.

[13] By a letter dated 20 November 2019, the AGC stated that it had no objections to Tuan Saifullah returning to the MRS Kuala Lumpur to conclude the hearing of the *nusyuz* summons subject to the condition that his 'tauliah' as the judge of the MRS Kuala Lumpur was extended.

[14] The *nusyuz* summons was assigned to Judge Hizwan bin Mohamed Nor ('Tuan Hizwan'). The continued trial of the *nusyuz* summons did not resume before Tuan Hizwan. It was adjourned for about a year pending the outcome of Justynn's review application before the MTS Kuala Lumpur on the issue of the notes of proceedings.

[15] Tuan Hizwan was then transferred and replaced by Judge Rosdi bin Hanapi ('Tuan Rosdi') on 17 August 2020. The *nusyuz* summons was called up for mention before Tuan Rosdi for the first time on 3 November 2020, more than one year after Tuan Saifullah was transferred to the AGC. During the mention of the case, the applicant's Syariah counsel made an application to have Tuan Saifullah to continue hearing and adjudicating the *nusyuz* summons. Tuan Rosdi dismissed the application on the ground that Tuan Saifullah needed the requisite 'tauliah' to continue hearing the *nusyuz* summons. He then directed for the trial to continue to be heard before him.

[16] The trial of the *nusyuz* summons proceeded before Tuan Rosdi on 3 November 2020 and 6 January 2021 with the examination-in-chief and cross-examination of Justynn. On 12 January 2021, the continued

A cross-examination of Justynn was adjourned as the applicant had instructed his Syariah counsel to file an application for the recusal of Tuan Rosdi on the grounds of events that transpired in another separate proceeding taken out by Justynn at the MRS Kuala Lumpur ('the divorce proceedings') pursuant to s 47 of the Islamic Family Law (Federal Territories) Act 1984 was heard by Tuan
B Rosdi.

[17] Following the application for recusal of Tuan Rosdi in the *nusyuz* summons, the applicant, through his solicitors, applied to the first respondent, vide letter dated 12 March 2021, to have Tuan Saifullah resumes hearing and
C adjudicating the *nusyuz* summons ('the recall application'). The natural consequence of allowing the recall application would require the respondents and/or the Syariah Court to procure the *tauliah* for Tuan Saifullah to hear the *nusyuz* summons. There was no response from the first respondent.

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[18] By a letter dated 5 April 2021, the applicant renewed his aforesaid application. According to the applicant, the recall application vide the two letters dated 12 March 2021 and 5 April 2021 above was premised on the following grounds:

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(a) the *nusyuz* summons had reached an advanced stage before Tuan Saifullah with the completion of the plaintiff's case; and

(b) Tuan Saifullah had the advantage of seeing and hearing the plaintiff's witnesses and the demeanour of the witnesses. He is better positioned to
F appreciate the facts before him and to complete hearing of the *nusyuz* summons.

[19] As alluded to earlier, the AGC had no objections to releasing Tuan Saifullah for hearing the Kuala Lumpur *nusyuz* summons subject to the
G requirement of a valid 'tauliah'.

[20] By a letter dated 14 April 2021, the first respondent, through his chief registrar, rejected the applicant's recall application ('the impugned decision'). The said letter, inter alia, states as follows:

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> Sehubungan dengan itu, Jabatan ini kekal dengan pendirian seperti yang terdahulu bahawa hakim bicara sebagaimana yang telah dipersetujui oleh peguam-peguam kedua-dua belah pihak bahawa kes ini akan terus didengar dan diputuskan di hadapan beliau [Tuan Rosdi Hanapi].

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[21] Aggrieved, the applicant commenced this judicial review application, inter alia, for the following orders:

(a) a declaration that the applicant's fundamental rights to have a fair trial and to a fair procedure under arts 5(1) and 8(1) of the Federal

Constitution have been violated by the impugned decision;

(b) a direction in the nature of certiorari to quash the impugned decision;

(c) a direction in the form of a writ of mandamus to compel the first respondent to approve and allow the recall application;

(d) a further direction in the form of a writ of mandamus to compel the respondents to take all necessary steps, including but not limited to the procurement of a valid *tauliah* to enable Tuan Saifullah to resume hearing and adjudicate the *nusyuz* summons; and

(e) a direction in the form of a writ of certiorari to quash the divorce proceedings at the MRS Kuala Lumpur

[22] Leave to commence judicial review was granted by this court on 17 January 2022.

THE JUDICIAL REVIEW

[23] This application for judicial review is supported by the affidavit of the applicant in encl 3 ('AIS3'). There were various exchanges of the affidavits between the parties, which will be referred to as and when the need arises.

[24] Learned counsel for the applicant submitted that the applicant's challenge to the impugned decision is not a challenge on the question of Islamic law. Rather, the applicant questioned the refusal of the first respondent to cause Tuan Saifullah to resume hearing of the *nusyuz* summons. According to learned counsel, the refusal violates the applicant's guaranteed right under arts 5 and 8 of the Federal Constitution.

[25] The line of submission of learned counsel for the applicant is that this court has supervisory jurisdiction. Learned counsel relied on the majority judgment of the Federal Court in *Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 323 (FC). Tengku Maimun CJ, in delivering Her Ladyship's judgment, held that in light of the judgments of Federal Court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 (FC) and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 (FC), in all cases, the civil superior courts retain supervisory jurisdiction which is inherent in their function under arts 4(1) and 121(1) of the Federal Constitution.

[26] Secondly, learned counsel invited this court to draw a distinction between the law itself and the enforcement of such law. The extension of the argument is that the validity of the law does not automatically render the enforcement action valid: *ZI Publications Sdn Bhd & Anor v Jabatan Agama*

Islam Selangor & Ors [2018] 5 MLJ 814 (CA).

[27] Thirdly, the applicant contended that the respondents are considered public authorities whose decisions are amenable to judicial review within the purview of O 53 of the Rules of Court 2012 ('the ROC').

[28] The line of argument of learned counsel is that the first respondent has a duty to protect the applicant's fundamental rights guaranteed under the Federal Constitution.

Article 5(1) of the Federal Constitution

[29] Article 5(1) of the Federal Constitution provides that no person shall be deprived of his life or personal liberty save in accordance with law. Learned counsel for the applicant submitted that the provision in art 5(1) is wide enough so as to cover the protection of a person's life in the widest sense or his personal liberty in the widest sense. These rights may not be deprived save in accordance with the action of a public authority that is fair both in point of procedure and substance: see *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 (FC).

[30] According to learned counsel, the applicant's constitutional right to fair trial was violated since:

(a) the trial had gone on for more than 30 days and the applicant had closed his case. Tuan Saifullah had the audio visual advantage of accessing the demeanour of the applicant's witnesses;

(b) it is, therefore, in the interest of the applicant and Justynn to have Tuan Saifullah continue presiding over the part-heard case of the *nusyuz* summons since it has reached an advanced stage; and

(c) in any event, the AGC had permitted Tuan Saifullah to continue hearing the *nusyuz* summons.

[31] Given the advanced stage of the continued trial of the *nusyuz* summons and the permission granted by the AGC, learned counsel submitted that no reasonable authority seized with these facts would have made the impugned decision that the first respondent did.

[32] Learned counsel then questioned the assertion made by the first respondent in the 14 April 2021 letter ('the impugned letter') that the Syariah counsel for the applicant had purportedly agreed to Tuan Rosdi presiding the *nusyuz* summons. If indeed there was such an agreement, the applicant would not have argued for his recusal due to the potential conflict of interest.

[33] In any event, according to learned counsel, the applicant had a legitimate expectation that Tuan Saifullah would continue hearing the *nusyuz* summons until its conclusion.

THE RESPONDENTS' RESPONSE

[34] In objecting to this judicial review application, the learned senior federal counsel ('SFC') submitted that the conduct of the *nusyuz* proceedings before the MRS Kuala Lumpur is within the jurisdiction and power of Tuan Rosdi. It is the contention of the learned SFC that this court has no jurisdiction to intervene since the conduct of the *nusyuz* proceedings is not amenable to judicial review.

[35] My attention was then drawn to art 121(1A) of the Federal Constitution. It provides:

> The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

The learned SFC submitted that if indeed the applicant is aggrieved with Tuan Rosdi's decision to continue presiding with the trial, the applicant should have challenged the said decision pursuant to s 51(1) of the Administration of Islamic Law (Federal Territories) Act 1993 ('the AIL Act') or an appeal under s 48 of the same.

[36] According to the learned SFC, the mere fact that all Syariah judges in Kuala Lumpur are public servants does not render their actions amenable to judicial review by the civil courts.

[37] In so far as the right of the applicant to a fair trial is concerned, the learned SFC submitted that the right to a fair trial does not include a right to have the case heard before the same judge from the beginning until the end, regardless of what happens. By extension, the fact that the *nusyuz* summons was not continued to be presided by Tuan Saifullah does not amount to a violation of the right to a fair trial.

THE ANALYSIS

[38] The central issue before me, I believe, is whether the impugned letter is amenable to judicial review. The approach in determining the issue is, to my mind, first to identify whether the decision is an administrative one or a judicial one. Paragraph 3 of the said impugned letter states as follows:

> Walau pun begitu, suatu tindakan wajar telah dibuat secara pentadbiran bagi mengenal pasti kes tersebut dan mendapati bahawa pada 03 November 2020, kes ini disebut bagi sambung bicara di hadapan Hakim bicara baru iaitu Tuan Rosdi

A Hanapi. Catatan mahkamah pada tarikh tersebut memutuskan bahawa atas persetujuan peguam-peguam kedua-dua belah pihak bersetuju kes tersebut disambung bicara di hadapan hakim bicara sebagaimana kehendak seksyen 128 Akta Tatacara Mai (Mahkamah Syariah Wilayah-Wilayah Persekutuan) 1998.

B **[39]** To begin with, the first respondent conceded that he was exercising his administrative function. This can be seen when he employed the words 'suatu tindakan wajar telah dibuat secara pentadbiran' which denotes that whatever decision he made was in the administrative capacity. In short, the first respondent was not exercising a judicial function.

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[40] In the circumstances, the issue of a revision by or an appeal to the MTS Kuala Lumpur does not arise. If revision or appeal is the proper avenue, the first respondent would have said so in the impugned letter.

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[41] Since the impugned decision was made in the administrative capacity, it is amenable to judicial review under O 53 of the ROC.

[42] But even if we assume for one moment that the impugned decision was
E made in the judicial capacity, is it still amenable to judicial review? The learned SFC was of the view that it is not. He relied on art 121(1A) of the Federal Constitution.

[43] On the other hand, relying on *Iki Putra*, learned counsel for the
F applicant, submitted that this court has the jurisdiction. The learned Chief Justice, in Her Ladyship's judgment in *Iki Putra*, referred to *Indira Gandhi*. In *Indira Gandhi*, the Federal Court held that cl (1) and (1A) of art 121 of the Federal Constitution illustrate that both the civil and Syariah Courts co-exist in their respective spheres, even if they are dissimilar in the extent of their powers
G and jurisdiction. Thus, the amendment inserting cl (1A) in art 121, according to the Federal Court, did not oust the jurisdiction of the civil courts, nor did it confer judicial power on the Syariah Courts.

[44] Now, having said that what is the gist of the complaint of the applicant?
H The applicant's complaint is that he would not be accorded a fair trial in the *nusyuz* proceedings and that this had infringed his constitutional right under art 5.

[45] However, as I alluded to earlier, the learned SFC contended that a fair
I trial does not include a right to have the case heard before the same judge from the beginning until the end. With respect, I am entirely in agreement with this line of submission. What if a trial judge retires? What if a trial judge is incapacitated or passes away? What if the trial judge is transferred, as in this case, to a different non judicial capacity?

[46] To insist on the same trial judge to continue hearing a case at all costs despite it being legally impractical is akin to forum shopping. This court is not prepared to do so.

[47] But the complaint made by the applicant is also on the basis that Tuan Rosdi was the presiding judge on the divorce proceedings initiated by Justynn. Given such a scenario, Tuan Rosdi is the same trial judge who would preside in both the divorce proceedings and the continued hearing of the *nusyuz* proceedings. Given the nature of the dispute between these two proceedings, which involved Islamic family law, I am of the considered view it would be desirable Tuan Rosdi.

FINDINGS

[48] In the result, I am issuing the following orders:

(a) the impugned decision is amenable to judicial review to the extent that the direction to retain Tuan Rosdi is tainted with *Wednesbury* unreasonableness;

(b) this court is not prepared to issue an order for Tuan Saifullah to continue presiding at the *nusyuz* proceedings. Since Tuan Saifullah is no longer in the judicial service, the only possible route for him to continue hearing the *nusyuz* summons is for him to be reappointed by the Yang di-Pertuan Agong, on the recommendation of the Chief Syariah judge under s 44 of the AIL Act. If allowed, an order of this nature would mean that that this court can direct the Yang di-Pertuan Agong to appoint Tuan Saifullah as a judge of the Syariah Subordinate Court. I do not think this court has the power to do so;

(c) however, as I indicated earlier, the dictate of a fair trial requires the *nusyuz* case to be heard by another judge of competent jurisdiction other than Tuan Rosdi and I so order; and

(d) all other reliefs sought by the applicant are dismissed. To that extent, this judicial review application is partly allowed.

[49] There shall be no order as to costs.

Judicial review application allowed in part with no order as to costs.

Reported by Dzulqarnain Ab Fatar